IN THE

Supreme Court of the United States

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OCTOBER TERM 1979

NO. 79-1880

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	Page
The Opinion Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	8
United States Constitution	8
Constitution of Washington	9
Questions Presented	11
Statement of the Facts of the Case	14
Questions Are Substantial and of Widespread Impact	50
Introduction	50
Separate Causes of Actions Entitled to Judicial Relief	61
Conclusion	72

TABLES OF AUTHORITY

Table of Cases

Page

Agins v. City of Tiburon, U.S. Supreme Court No. 79-602 (Oct. Term, 1979) 7,50,59,67

Andrus v. Allard, 100 S. Ct. 318 (1979) . . 68

Armstong v. United States, 364 U.S. 49 (1960) 7

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 7,73

City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 7,72

Davis v. Passman, ___ U.S. ___, 60 L. Ed. 2d 846, 99 S. Ct. ___ (1979) 7,73

El Paso v. Simmons, 379 U.S. 497 (1964) . . 65

Ettor v. Tacoma, 228 U.S. 148 (1913 72

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 8

Gordon v. City of Waren, 379 F.2d 386 (6th Cir. 1978) 68

Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979) 7,61,68

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). . . 7

Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1948) 7

Page

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 66,73

Monqahela Navigation Co. v. United States, 148 U.S. 312 (1803) 68

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 7-8,63,72

Mosher v. Phoenix, 287 U.S. 29 (1932) . . . 71

Mugler v. Kansas, 123 U.S. 623 (1887) . . . 69

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). . . 7,66,68

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 8,64

Portsmouth Harbor L. & H. Co. v. United States, 260 U.S. 327 (1922) 64,71

Truax v. Corrigan, 257 U.S. 312 (1921). . . 72

United States v. Causby, 328 U.S. 256 (1946) 7

United States v. Central Eureka Mining, 357 U.S. 155 (1958) 71

United States v. Dickinson, 331 U.S. 745 (1947) 7

United States v. General Motors Corp., 323 U.S. 373 (1945) 7,66

United States v. Gerlach Livestock Co, 339 U.S. 725 (1950) 71

United States v. Great Falls Mfg. Co., 112 645 (1884) 71

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THE OPINION BELOW

The opinion of the Supreme Court of Washington is reported at 92 Wn.2d 656, 601 P.2d 494 (1979) as The Department of Natural Resources, et al. v. Thurston County, et al., reversing the trial court. The Appendix to this statement is in a separate volume and is where the opinion appears (App. A, A-184).

JURISDICTION

1. This is a civil action brought by the appellant[1] against the appellee, Thurston County and Thurston County Board of Commissioners acting individually or as a Board, for having either exceeded their lawful authority without due process of law under the Fourteenth Amendment, or if having had such authority under the platting and subdivision laws and the State Environmental Policy Act of 1971 (SEPA) then those laws were in violation of the Fifth and Fourteenth Amendment of the United States Constitution. The appellant after having exhausted its administrative remedies in hearings before the Thurston County Commissioners and an

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[1] The State of Washington through its Department of Natural Resources, a co-party to the proceedings below has filed with this Court a separate Petition For Write of Certiorari entitled: Department of Natural Resources of The State of Washington, et al., Petitioners v. Thurston County, et al., Respondents.

appeal before a state board of appeals, the Shorelines Hearings Board, wherein it obtained a judgment in its favor that the platting and proposed use of its property complied with the environmental laws and regulations limiting its use, continued to trial an action of review of the Commissioner's first decision on those issues and commenced a separate action for peremptory mandamus relief after the appellees did not appeal the Shorelines Hearings Board decision. On consolidation of the judicial review action and the mandamus action, it obtained an interim mandamus order requiring the appellees to grant approval of its preliminary plat and permits for its development, reserving trial court jurisdiction of issues of constitutional liability, damages and compensation and trial of causes of actions for relief by the appellant. The appellees appealed and the Supreme Court of Washington (Supreme Court) reversed the trial court's decision. The appellant alleged that the actions of the appellees and the Supreme Court were in

violation of the procedural and substantive rights of due process of law guaranteed to the appellant by the Fourteenth Amendment and resulted in its private rights of liberty of choice, use, ownership, enjoyment and disposal of its property being taken for public use without just compensation under the Fifth Amendment, or as prohibited by Article I Section 16 of the state constitution for which it was entitled to mandamus relief and trial on those issues of liability for damages or compensation together with trial of its other causes of action cut off by the acceptance of appellate jurisdiction and the decision of the Supreme Court.

2. The judgment of the Supreme Court became final as to that court terminating review on Feburary 20, 1979. the Notice of Appeal to this Court was timely filed on May 13, 1980. Mr. Justice Rehnquist extended appellant's time to docket the appeal in this Court to May 28, 1980.

3. Jurisdiction of this Court is invoked by Title 28 U.S.C. Sec. 1257 (2). The Court has

jurisdiction first under the issue of the Fourteenth Amendment in that the Supreme Court determined the state platting statute and/or its Environmental Policy Act of 1971 were with procedural and substantive due process of law when the thrust of the issues raised throughout the administrative proceedings in Thurston County in processing the application of plat approval and effort of the appellant to obtain permits to use its property was that either Thurston County constitutionally without due process of law exceeded their statutory and constitutional authority delegated to them, or otherwise the statutory and regulatory authority delegated to them was in violation of the due process rights of the appellant protected by the Fourteenth Amendment.

The Court likewise has jurisdiction on the issue if whether the private property of the appellant has been taken for public use without just compensation by an exercise of regulatory

police powers of the state by the appellees prohibited by Article I Section 16 of the state constitution or Amendment V as a violation of the due process clause of the Fourteenth Amendment.

Whereas, the issues raised on this appeal insofar as the appellant has claimed a cause of action for damages and relief against the appellees for having exceeded their procedural and substantive authority without due process of law in violation of the Fourteenth Amendment may only be considered by this Court in the exercise of its discretionary certiorari authority, on the other hand, case law amply sustains that this case should be heard on appeal of the decision made by the Supreme Court on the issues that the state platting statute and SEPA, as found by the Supreme Court, constitutionally delegated regulatory police powers to the appellees that did not result in private property having been taken for private use without just compensation.

As an exercise of discretionary review by this Court the appellant cites: Kaiser Aetna v. United States, ___ U.S. ___, 100 S. Ct. 383 (1979); Davis v. Passman, ___ U.S. ___, 60 L. Ed. 2d 846, 99 S. Ct. ___ (1979); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Armstrong v. United States, 364 U.S. 49 (1960); Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1948); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Causby, 328 U.S. 256 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Lee, 106 U.S. 196 (1882).

As an exercise of appellate jurisdiction by this Court the appellant cites: Agins v. City of Tiburon, U.S.S.Ct. No. 79-602, October Term, 1979; Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Moore v. City

of East Cleveland, 431 U.S. 494 (1977); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article VI: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; . . .".

Fifth Amendment: ". . . nor shall private property be taken for public use, without just compensation.:

Fourteenth Amendment: "SECTION 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Constitution of Washington

Article I
Declaration of Rights

Section 1. Political Power. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Section 3. Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

Section 12. Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Section 16. Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.

Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Article II

Section 1. Legislative Powers, Where Vested. The legislative authority of the State of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

Article XI
County, City, And Township
Organization

Section 11. Police and Sanitary Regulations. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

All relevant records of proceedings below are set forth in a separate bound volume as Appendix A.

Statutes are Appendix B and regulations are Appendix C.

QUESTIONS PRESENTED

1. Were the quasi-judicial decisions of Thurston County and the judicial decisions of the Supreme Court made in excess of procedural or substantive authority granted by the State of Washington and therefore in violation of the rights of Lake Lawrence, Inc., guaranteed by the Fourteenth Amendment?
2. Did the court below violate rights secured under the Fifth and Fourteenth Amendments by resolving the taking issue against Lake Lawrence, Inc. without the benefit of an evidentiary hearing in the trial court on its causes of actions against Thurston County, et al?
3. Was the court below in error when determining if whether the rights of the appellant to own use, enjoy and dispose of its property were taken for public use without just compensation as protected by the Fifth and Fourteenth

Amendments of the United States Constitution when employing as an exclusive criteria a "balancing" test of public versus private economic values without consideration of other factors including the justness and fairness of Thurston County's actions, the intent by which they were employed and the accumulative effect upon those rights by the means employed?

4. Does Thurston County's ad hoc interpretation of "public interest" under either state platting or environmental laws amount to improper retrospective amendment of duly adopted zoning regulations for Wood Point in violation of the Fourteenth Amendment Due Process Clause and Equal Protection Clause?

5. Assuming the procedural and substantive validity of the land-use restrictions imposed by Thurston County, does application of those restrictions which favor assumed eagle-use of perch trees in areas of the appellant's property, to the exclusion of human activity

on that property, result in uncompensated private property having been taken for public use prohibited by Article I Sec. 16 of the State of Washington Constitution or the prohibitions of the Fifth Amendment, and therefore a violation of the Fourteenth Amendment of the United States Constitution?

6. Has Thurston County deliberately discriminated against Lake Lawrence, Inc. in violation of the Equal Protection Clause of the Fourteenth Amendment by arbitrarily ignoring area-wide land use regulations which allowed similarly situated lands on the shores of Lake Lawrence to be platted and developed as residential home sites while denying similar land use rights to appellant and thereby result in property being taken for public use without just compensation?

7. Are damages or compensation, including reasonable attorney's fees, awardable for violations of the Fifth and Fourteenth Amendments in this case?

8. Are either or both of the state platting statutes and the State Environmental Protection Act that the State Supreme Court decided authorized Thurston County to deny plat approval, and issuance of permits to subdivide, use, own and enjoy its property, unconstitutional in violation of the rights of Lake Lawrence, Inc. as protected by the Fifth and Fourteenth Amendments of the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

In the fall of 1976 Lake Lawrence, Inc. acquired from its president, as Lessee, an assignment to a 55 year term leasehold estate that he had just acquired in 14 acres of inimproved land fronting on Lake Lawrence in Thurston County by being a successbul bidder for lease of that land from the state.[2] Subsequently the corporation

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[2] The fee title to the land is owned by the State of Washington and administered in trust for the benefit of the educational needs of the University

acquired another leasehold estate from the state of the submerged lands beneath the water a distance of 100 feet for the purpose of construction of a private community pier into the lake for residential use.

The president and the corporation were led by the state and county to believe that the land could be subdivided into single family home-site lots, that a private community pier could be constructed on the waterfront, and the property be owned, used, enjoyed and disposed of by sublease to others for those purposes. The state agency leasing the property filed a statement of "non-significance" (App. C A-317) that the leasing of the property for those purposes was not a "major action" that

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[2] Continued
of Washington by the Department of Natural Resources. It has filed a petition for writ of certiorari to this Court. It did not appear in administrative proceedings occurring in Thurston County. It filed a response to the draft EIS as an agency having special expertise under SEPA regulations favorable to the project proposed by the appellant (App. C. A-345). It also appeared as a co-party with the appellant in all Shorelines Hearings Board proceedings and all court proceedings.

would have a "significant adverse impact on the environment" to require environmental impact statements (EIS) to be prepared by it to make a decision to lease those properties as required by the mandate of the State Environmental Policy Act of 1971 (SEPA) and the Washington Administrative Code (WAC) guideline regulations. (SEPA, App. B A-266: WAC, App. C A-315)

Prior to leasing the shorelands the president attempted a "presubmission conference" as required by the platting and subdivision regulations of Thurston County (App. C A-302) as a condition to submitting a preliminary plat application and become informed by county planning department officials what "pertinent information" was needed to obtain the right to subdivide the land as permitted by the lease. He was misled from information received at that conference that the land classified and designated as being in a "Rural Environment" (App. C A-373) could be subdivided into two lots per acre with some allowance for buffer areas and could be developed and used

for single family residency: provided the preliminary plat complied with the Thurston County Shoreline Master Program regulations that implemented the policies of the Shorelines Management Act of 1971 (SMA) (App. C, A-366; App. B, A-280).

After leasing the submerged lands the corporation was likewise led to believe that such community private dock was favored in place of numerous docks to each lot along the shorelines of the lake (App. C, A-365). The planning department officials had no information that there was any special environmental factors to consider so long as the preliminary plat and proposed use complied with configuration and size of other residential lots surrounding the lake designated as being in the same "Rural Environment" classification as the property leased. The purpose of the "presubmission conference" was to: " . . . eliminate as many potential problems as possible in order for the preliminary plat to be processed without delay." (App. C, A-302.)

Lake Lawrence is a shallow, inland, circular lake with depths of not more than 30 feet and approximately one-half square mile in size (App. C, A-377). It is one of a number of small lakes in Thurston County (App. C., A-378) located within approximately ten miles from the heaviest population center of the "urban core" of the state capital of Olympia (App. C, A-406). By 1976 its shorelands as well as those of other lakes near the center of population of the county, had been subdivided into lots and improved for use as permanent or recreational single family residency.

Wood Point, named by the appellant, is located on the south shore of a point on the lake next to a large acre parking lot to its west with a boat ramp on the lake maintained by the state fisheries department who stocks the lake annually with trout for fishing by the public for whom the parking lot and boat ramp is maintained. A county road enters from the west and terminates at the parking lot. Continuing west between the lake and road and around approximately two-thirds of the remainder of

the lake; except for another point that projects into the lake on its west shoreline, all of the shorelands have been subdivided, improved, or are being improved, with single family homes. Numerous privately owned piers extend from lots into the lake. The area described was classified and designated by map to be in the "Rural Environment" (App. C, A-377) by the master program regulations of Thurston County. The point on the west boundary and an area on the east boundary of the lake continuing to the east boundary of Wood Point was classified and designated to be in the "Conservancy Environment" by the master program regulations.[3]

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[3] All shoreline waters in Thurston County on lakes and streams were designated by maps to be in either the "Urban", "Rural", "Conservancy" or "Natural" Environment by the county having made in cooperation with the state an inventory, assessment and identification of the environment values area-wide to protect the natural environment, including wild life, along the shores of those areas. The "Urban" and "Rural" environmental classification regulations give no heed to the protection of wild life to lands designated in those classifications (App. C, A-352--377).

Human activity enjoying the lake waters occurs throughout the year which includes fishing, swimming, boating, waterskiing and duck hunting. Northern bald eagles have frequently been observed visiting the lake and other lakes near the "urban core" to perch on trees and feed on fowl, fish and animals from their shores and waters.[4]

Following the "presubmission conference" and commencing in January, 1977, Lake Lawrence, Inc. made application for approval to subdivide its property and obtain environmental shoreline permits and SEPA approval for the subdivision and the construction of a private community pier similar to the existing uses being made by other property

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[4] Northern bald eagles migrate along the Pacific Coast from the Alaska panhandle to northern Oregon. At the time the EIS documents were prepared in this case they had not been placed by the federal or state government as being in either the "endangered" or "threatened" status in Washington. The only reference to their status as being "endangered" birds appears not in the EIS documents but in the Comprehensive Plan, a plan for future legislation not implemented by any ordiances and not identifying any area or standards or specifications for how they were to be protected (App. C, A-378).

owners as single family residences around the designated in the same "Rural Environment" classification. It first proposed a subdivision of 27 residential lots. Upon continuing and successive demands made by Thurston County that areas should be set aside free from human activity for the protection of the habitat of eagles using the site, the appellant twice re-engineered its plans to obtain staff approval by first modifying the subdivision to 24 lots (fourteen waterfront and ten back lots) and then to 22 lots (twelve waterfront and ten back lots), setting aside two waterfront lots to be free from human activity. The appellant incurred considerable expense for payment of attorney's fees and costs of engineering and studies made by biologists as experts in the field of wild life environment, particularly eagles. During that time Thurston County rejected each proposal made by the appellant to use its property and each time made more demands that more area be set aside free from human activity so as not to disturb the visiting eagles. The last demand

included that the entire shoreland 200 feet back from the shoreline be set aside for eagles' exclusive use. The staff rejected the construction of any dock on the shorelines.

The first decision of the Commissioners was made September 28, 1977 (App. A, A-30) on the last staff recommendation of September 21, 1977 that the property be rezoned by designating it to be in a "Natural Environment" that permits only one home site. None of the shorelands surrounding the lake are in that zone. The staff's recommendation was based upon information obtained after the environmental documentation required by SEPA regulations had been completed, published and circulated contrary to specific SEPA regulations (App. C, A-334, 343, 344, 347).

A staff member had obtained on his own initiative, extra environmental information from the state game department in a letter recommending that a 200 foot area upland from the shoreline be set aside free from development and use based upon a graduate's thesis study of the flight response of

eagles from human disturbance when perching on trees to feed on salmon from a river and their view was protected from human activity by a canopy of trees and vegetation below where they were perching. The hypothesis for using such a study was that Lake Lawrence (described by one biologist as a "put and take" fishing lake) supplied food for the eagles necessary for their survival and that eagles were "nesting" or "roosting" in the area.[5] The

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[5] Local government quasi-judicial hearings and decisions are not subject as "state agencies" to the due process protections of the State Administrative Procedure Act (App. B, A-260). The extra-environmental information was introduced into the record by Thurston County that eagles were nesting or roosting in the area and was subsequently proved false in the Shorelines Board de novo quasi-judicial hearings protected by that act. Thurston County has no active eagles" nests or roosting sites. The nearest eagles' nest is in Pierce County on the Fort Lewis artillery firing range. At the time one of the most knowledgable biologists on eagles was Mr. Anderson, employed by Weyerhauser Timber Co., who was unwilling to testify at the county hearings because of company policy but testified at the Shorelines Board hearings subject to subpoena power and accounted for a large roosting site of eagles near Klamath Falls, Oregon and how the company had installed a perching site of bare poles unprotected by any canopy near a freeway so that eagles could feed from a lake in town when a lake near their nesting and roosting site had frozen over.

appellant served and filed on each commissioner a response objecting to the staff's recommendation on statutory and constitutional grounds which were disregarded by the first decision made by the commissioners (App. A, A-1; A-30). The first decision neither rejected or denied the application for the shoreline permit to construct the pier (App. B, A-288).

After the first decision the appellant appealed the environmental decision of Thurston County to the Shorelines Hearings Board (App. B, A-295) as to compliance of the preliminary plat with SEPA and SMA environmental regulations in subdividing the property and being used for single family residence as was last proposed by it for 22 lots where two lots were set aside for the exclusive use of eagles upon the continuing and succesive demands that were made on the appellant by the county planning department ouside of SEPA process. That proposal likewise proposed to create islands around most of the highest trees that Lake Lawrence, Inc. caused to be surveyed and marked to

identify areas where eagles perched which the appellant proposed to the staff, upon its demands after DEIS documentation had become final, to mitigate theoretical harm to eagles' response from human activity by leaving them standing with the canopy below to be undisturbed through restrictive covenants to prevent human intrustion into those areas. Setback of homes from the shoreline were likewise proposed and timber counts were made to satisfy demands by the county so that as little time would be removed as feasibly possible.

On March 23, 1978, the appellant obtained a decision from the Shorelines Hearings Board in its favor (App. A, A-57). Since Thurston County in its first decision had not acted upon the application of the appellant for granting a shoreline development permit for the pier, the Board refused to accept jurisdiction to decide that issue and only decided the issue if whether the preliminary plat subdivision and development and use of the property for single family homesites complied with both SEPA and SMA and their implementing county regulations.

after the commissioner's second decision in May, 1978 (App. A, A-69), where they first made written findings and conclusions and a decision[6] not to grant a permit to construct the pier, the appellant appealed that decision to the Board, the Board continued de novo review to await the decision of the Supreme Court, and because of the Supreme Court's opinion authorizing the county commissioners to have paramount authority under SEPA to preempt the Board's decision, has now discharged the appeal of that decision without argument of the appellant. It is apparent that if the Board ruled in favor of the appellant, Thurston County is authorized to deny the permit and preempt the

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6 After the decision the Supreme Court held that local government must make written findings and conclusions of law to support their decision without stating if whether the grounds for doing so was due process of law or was necessary to satisfy the burden of proof that is imposed on "decision-makers" by case law to show that they complied with SEPA mandates. (See Supreme Court Decision, App. A, A-191.)

Board's decision on the same subject matter by its SEPA checkmate authority as was decided by the Supreme Court in favor of Thurston County on the platting issue.

After the first decision of Thurston County the appellant appealed to the Superior Court the platting decision as to compliance of the preliminary plat with the platting laws, and SEPA environmental decision making consideration riding piggy-back of the platting decision under the platting laws and shorelines permits decision (App. A, A-32).

Review was accepted by the trial court (App. A, A-43), and a petition of prohibition was granted against Thurston County from rezoning the property (App. A, A-43). Trial was set on the review to a time to await the decision of the Shorelines Hearings Board, which if not in its favor, the appellant would have to appeal its decision within 30 days and join it with its cause of action for review of the Commissioner's first

decision (App. A, B-264).[7] The petition for review and prohibition with affidavits cited the statutory laws for grounds to grant such review and prohibition which include the constitutional violation of rights of the appellant (App. A, A-39). The order of show cause against the appellees recites those constitutional grounds (App. A, A-41). Upon the order being granted that the administrative record of Thurston County's first decision be reviewed (App. A, A-43), Thurston County caused to be filed that record in trial court that included the constitutional objections made in the response of the appellant to the first decision being entered if the Commissioners followed the staff recommendation of September 21, 1977 (App. A, A-1).

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[7] While the appellant would have had to appeal the Shorelines Hearings Board decision so as not to be denied a shorelines development permit and approval of its plat, local government need not appeal the Shorelines Hearings Board decision as being above that law as "independent" SEPA "decision-makers" under the Supreme Court opinion, infra.

After the Shorelines Hearings Board decision was made in favor of appellant on March 23, 1978, in April and May, 1978 a series of events occurred whereby through the actions of Thurston County, out of court while being adversary parties without any SEPA procedural or statutory platting authority to do so,[8] the appellant was finessed out of its constitutional rights as claimed in this appeal. While a trial date was set for April 17, 1978 to April 20, 1978 (App. A., A-43), Thurston County, on Thursday, April 5, 1978, filed and had set for hearing on Monday, April 10, 1978, in Olympia in the Superior Court review proceedings, a motion

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[8] The trial court found that the County had not "supplemented, altered or amended" its EIS documents, infra. State law and county regulations require that "alternative" uses must appear in the EIS records and that the "responsible official", the Thurston County Planning Director, is responsible for identifying the environment (See App. B, A-267); App. C, A-312).

to the court to have the administrative proceeding record of its first decision returned to it and the trial date changed to July 6th and 7th, on grounds for time for it to decide if they would either grant the approval of the plat and issue the shorelines development permit for it, or contest the Shorelines Hearings Board decision as "clearly erroneous" (App. A, A-44).

Subsequently they did neither: they played a low card, ultimately holding the trump card in their favor: their claim of "independent" authority. The motion was received by the appellant's attorney on Friday, April 7, 1978, for a hearing already scheduled in Olympia, 75 miles away, on Monday. The appellant's attorney, out of the office, immediately caused to be dictated on that Friday, through his secretary, a motion that the record be returned to the court, that was filed in court on April 12, 1978, and alleged that the appellant was being deprived of its judicial rights of due process of law (App. A, A-51).

On April 10, 1978, without the appellant being represented or having had the opportunity to be represented, the court granted the motion returning the record to Thurston County and ordered that: "any appeals in this matter, either from denial of the plat or the decision of the Shorelines Hearings Board be consolidated and heard by this court on July 6th and 7th, 1978" (App. A, A-46). The appellant was not appealing the decision of the Shorelines Hearings Board and had already appealed the first decision (App. A, A-43). On that same Monday Thurston County acknowledged receipt of the record and, unbeknown at the time to the appellant, its commissioners met on that same day at Wood Point where there was gathered a small group of people protesting the decision of the Shorelines Hearings Board and the opinion of one of the commissioners was reported to say that their first decision was correct in requiring an area of 200 feet along the shorelands of appellant's property be free from human activity for the exclusive use of eagles (App. A, A-49.

On April 18, 1978, on the commissioner's own setting following the site investigation, a public hearing was held purportedly to decide if to appeal the Board's decision or grant approval of the plat and shorelines permit. On that basis the appellant was lulled into appearing but when the commissioners opened the hearing to testimony from the members of the public local to Wood Point as to the harm that would result by the project's disturbance to the eagles, counsel objected to the proceedings and withdrew. On May 28, 1978, after the Shorelines Board decision became final, the commissioners played their trump card and made their second decision by filing written findings, conclusions of law and the decision in the review proceedings without having done what was represented to the court and to appellant's counsel by them would be done, appeal the Board's decision or grant approval of the plat and issuance of the shoreline

permit (App. A, A-71).[9] The first stage of the finesse had been completed.

Prior to that decision the appellant had caused to be filed on April 12, 1978, a motion for return of the record to the court in the plat proceedings (App. A, A-51), which was granted on April 17, 1978, ordering Thurston County to return the record by April 27, 1978 (App. A, A-54). It was not returned by Thurston County until May 31, 1978 (App. A, A-71). When it was returned it was not the same record. It had been supplemented by Thurston County adding to it all of the Shorelines Hearings Board's records after that Board's decision had become final (Book V through Book XII) and the record of the county's own proceedings when making its second retrospective decision. The second stage of the finesse was completed. The appellant, realizing what was about to take place

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[9] See App. B, A-278; App. C, A-309.

by the commissioner's out-of-court written findings and conclusions being placed of record to circumvent the Board's findings and conclusions, which the county had not appealed, instituted special mandamus proceedings (App. B, A-255) in a separate action (App. A, A-94), for a peremptory writ to compel the county to have the plat approved and the shorelines permit issued based upon the Shorelines Hearings Board's findings and conclusions and the county's admissions that the plat complied with the platting statutes and regulations (App, A, A-81). In the affidavit for the application for such writ was set forth that it had incurred $40,000.00 caused by the denial of the use of the land and shall suffer irreparable damages by way of a change of economic conditions, condemnation of the ownership of its use without compensation and without due process of law, and denial of the use of the land for which there is no adequate remedy (App. A, A-106).

On July 6, 1978, the trial date occurring and without the superior court having granted approval

or denial of the record having been supplemented by Thurston County, the parties agreed by a signed stipulation ratified by court order that prior to the trial continuing there should be a decision on whether or not Thurston County on not having appealed the Shoreline's Board decision had on April 24, 1978 "constitutional and legislative authority" to do the following:

> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle habitat) having already been presented to the Shorelines Hearings Board;
> (b) Make a decision on the record before the Shoreline Hearings Board and the evidence at a new public hearing contrary to and in conflict with the prior Shorelines Hearings Board judgment on the same matter;
> (c) Enter Findings of Fact, Conclusions of Law and Judgment contrary to and in conflict with the Shorelines Hearings Board judgment of march 23, 1978.

App. A, A-107.

The separate mandamus proceedings were consolidated with the review proceedings and the granting or denial of the peremptory relief to the appellant requiring Thurston County to approve the

plat and issue the shoreline permit and a hearing on the damages or compensation was set over for decision by visiting Judge Pitt (App. A, A-110).

Judge Pitt on a decision on the record entered a memorandum opinion on August 11, 1978, in favor of the appellant (App. A, A-113). On September 25, 1978 the court filed its Findings and Conclusions on issues in favor of the appellant (App. A, A-118). Among the findings of fact the court noted:

(1) That the appellant had acted in reliance on the lease and the designation of the property as being in the "Rural Environment";

(2) That the Shorelines Board after a contested hearing had considered all environmental impacts that Thurston County claimed to be applicable to use of the property;

(3) That the environmental impact statements had not been "supplemented, altered or amended by Thurston County",[10] the author and sponsor of

[10] See Footnote 7, supra.

said document as "lead agency"; that the county had elected not to appeal the Board's decision;

(4) That on April 10, 1978 the Commissioners conducted a site inspection and commented on the Board's decision;

(5) That the Commissioners specifically found that the proposed project on Wood Point met all platting requirements and their decision regarding public interest in the environment was considered and decided by the Shoreline's Board decision;

(6) The Commissioner's decision is inconsistent with the Shoreline's Board findings that Wood Point is only an incidentally used perch area for eagles and is not critical or important to their habitat needs; and

(7) That the Commissioners had not granted approval of the plat and issuance of the permit as an "alternative" by further conditioning its use, but conditioned such "alternative" use being

granted only if the court's decision was not in its favor.[11]

From those facts the court made the following conclusions:

(1) The appellant had no adequate remedy at law;

(2) The court had jurisdiction over the parties;

(3) The "public interest" clause in RCW 58.17.110, App. B, A-277, "as applied" by Thurston County was unconstitutionally vague and violates the due process clause of both the State and Federal Constitutions;[12]

(4) that the "public interest" clause under the platting statute does not grant authority to deny the plat on environmental grounds, but that authority is derived from SMA and SEPA;[13]

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11 Compare with Supreme Court, App. A, A-199.

12 Compare with Supreme Court, App. A, A-197.

13 Compare with Supreme Court, App. A, A-198.

(5) The refusal to grant a substantial development permit after the Shorelines Hearings Board decision had become final is unlawful. Thurston County had no authority to "moot" the decision of the Shorelines Hearings Board decision that had already been litigated before the Shorelines Board.[14] The legitimate purposes of the State Environmental Act would be subverted by such action;

(6) The appellant is entitled to approval of the plat and issuance of a shorelines permit for it;

(7) The appellant has a right to rely on the "rural" designation of the property and the decision of the Shorelines Board;

(8) That applying a balancing test of the public interest in "legitimate governmental regulations" of the use of property versus the rights of the appellant in its proposed use of Wood Point

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[14] Compare with Supreme Court, App. A, A-197.

does not justify denial of the proposed plat, and "would" constitute an unconstitutional taking.

On September 21, 1978, the court entered an order in adjudication of the mandamus and review proceedings remanding the case to Thurston County to promptly grant the substantial development permit and approve the preliminary plat in compliance with the court's findings and conclusions, reserving jurisdiction, and reserving for a later hearing "any issues" of the Thurston County's "liability for damages to the plaintiff and the amount thereof (App. A, A-124).

On September 26, 1978, a hearing was set for damages on November 20th and 21st, and the appellant amended its petition for damages, setting forth as causes of action for loss a violation of SHB, the Shorelines Board decision, the platting statute, SEPA, the Fifth and Fourteenth Amendments of the United States Constitution, constitutional violation of the State of Washington, causing damages for temporary taking of $102,280.84 (App. A, A-125, 126-146).

The Amended Petition of the appellant alleges for constitutional violation of rights, unlawful action in tort, mandamus damages and special statutory damages under SMA. The complaint also alleges damages for future losses.

Thereafter on September 28, 1978, Thurston County appealed the order of Judge Pitt, obtained from the court of appeals a supersedeas without posting bond, an order temporarily staying the trial court's order, and a permanent order staying the order and further proceedings in trial court pending appeal. The court of appeals certified the case to the Supreme Court and formulated issues of liability of Thurston County that had not been fully decided by trial court (App. A, A-145-152).

The appellant filed in the Supreme Court a motion for discretionary review claiming that the powers of the trial court had been usurped when it reserved jurisdiction of the case; that the appeal was contrary to the stipulation entered into between the parties and argued that the result of

the appeal being granted denied the appellant a complete and fair trial on the issues of liability and damages in that the appeal is premature, preempts the jurisdiction of the trial court by appellate jurisdiction and denies access of trial to the record on review (App. A, A-153-182). On November 17, 1978 the motion was denied and the stays continued (App. A, A-183).

On October 4, 1979, the Supreme Court opinion was filed (App. A, A-184). It held as follows:

1. That the argument of the appellant that first decision of the commissioners denying the plat upon the staff's recommendation that 200 feet of the shoreland be set aside free from human activity for the exclusive use of eagles did not constitute an attempt at "spot" rezoning of the property by attempting to rezone the property from "rural" environment to "natural" environment as a violation of due process in that the comprehensive plan "governs" the use of the property and the change would not constitute a classification

different from and inconsistewnt with the classification of surrounding land. (Footnote 2, App. A, A-189.)

2. That the Commissioners are not bound by the Shorelines Board "finding", and that they have "independent authority" under SEPA to consider the environmental issue and deny the plat for environmental reasons. "We further hold that denial of the plat in this case does not violate respondent's rights to due process, or constitute a taking of private property for public use without compensation". (App. A, A-192.)

> 3. In summary, the environmental determinations mandated by SEPA are uniquely related to the particular decision being taken, and are conclusive only for that purpose. [i.e. Shorelines Board's decision, App. A, A-__]. They are not binding on other decision-making bodies. To hold otherwise would allow one decision-making body considering a related question to evaluate a particular environmental issue, and would foreclose independent analysis and deliberation. Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values. See RCW 43.21C.030.

(App. A, A-197.)

4. The trial court held the Commissioners' determination that approval of the plat was not in the "public interest" was an unconstitutional vague application of the platting statute. Since we are not concerned here with a regulatory statute prohibiting certain types of conduct and imposing sanctions for violation of its standard, the vagueness doctrine as such is not applicable. . . . As noted above, the Commissioners' authority to deny the plat on environmental grounds derive essentially from SEPA, and not from the platting statute alone.

   The validity of SEPA as a delegation of substantive legislative authority to apply its standards in a particular case was specifically upheld in Polygon Corp. v. City of Seattle, supra at 66. the court held that SEPA provides constitutionally adequate guidelines for governmental decision-making under the act, and that procedural safeguards are adequate if an opportunity to be heard is provided, and judicial review of the entire record is available. That is the case here. We therefore conclude there is no constitutional objection to the Commissioners' exercise of their authority under SEPA to deny the plat on environmental grounds. [App. A, A-197-198]

5. The determination whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interest against the public interest in imposing the regulation in question. . . . In considering the encumbrance on the property owner, the court will consider both the type of encumbrance imposed and whether the owner is thereby prevented from making a profitable use of the property.

> Of crucial importance in this case is the fact that the Commissioners' decision to deny the plat leaves open the possibility of approving a less dense development of Wood Point. The Commissioners have consistently maintained they would entertain an application for a plat which provides an adequate buffer zone for protection of the eagles' preferred perching and feeding areas. It should be noted that the Commissioners did not find any adverse impact from development of eleven of the proposed lots. Moreover, the findings provide specific guidelines for planning a buffer zone the Commissioners would find acceptable. Finally the decision left open the possibility of an alternate cluster configuration for the development--a configuration specifically favored by the County's Comprehensive Plan.
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> The facts apparent from the record in this case do not support a conclusion that 'there is not present, possible, and reasonably profitable alternative use to which his property is adaptable'. Carlson v. Bellevue, 73 Wn.2d 41, 51, 435 P.2d 957 (1968). [App. A, A-198-200]

On November 13, 1979, the appellant filed with the Supreme Court a motion for reconsideration (App. A, A-202). It was denied on February 20, 1979 (App. A, A-245). Prior to its denial the appellant also filed a statement of additional authorities (App. C, A-442).

In the motion the appellant attacked the opinion on the basis that the Supreme Court had not

answered one of the fundamental issues presented by the case, that is, if whether the Commissioners "had constitutionally exercised statutory authority that was delegated to them, or conversely, had unconstitutionally exceeded their authority without due process of law when they exercised their authority under the guise of having "independent" authority under the platting statutes or SEPA by the process the Commissioners employed in:

(a) obtaining the judicial record;

(b) making an investigation at the site in the presence of objecting neighbors;

(c) conducting hearings in an atmosphere of hostility and hearing from the same people who had been objecting to the project;

(d) entering out of court findings, conclusions of law and a second decision and them supplementing and "salting" the trial court's judicial record,

when that was done without an order of the court while not appealing the Shorelines Board decision

and being adversary parties to the judicial proceedings in trial court in review of their first decision (App. A, A-230). The appellant brought to the court's attention that the application for mandamus had alleged:

> There are no issues of fact or of law to be decided by the Court, and the petitioners are entitled to a Peremptory Writ of Mandamus in accordance with its proposed Writ hereof, and in compliance with the decision of the Shorelines Hearings Board of March 23, 1978, which the respondents, in violation of the law, have circumvented, and declared to be "moot", and based their decision upon subjective standards of their own making and without reference to either the substance or procedure of the environmental law of the State of Washington and Thurston County.

The appellant in its motion specifically made known that the Commissioners by their actions were and had circumvented the procedural mandates required for contesting the findings and conclusions of the Shorelines Hearings Board decision in accordance with the statutory mandate of RCW 34.04.030 (1) (App. A, A-264). Likewise the appellant made known that the Supreme Court was without original jurisdiction to accept review on

the basis of "illegitimate" use by Thurston County of appealing the interim mandamus order of the trial court to contest in the Supreme Court the Shorelines Hearings Board decision (App. A, A-207).

The appellant alleged that the primary basis of the authority the Commissioners exercised was to achieve the policies and goals not of SEPA and SMA but of the Thurston County Comprehensive Plan, a plan for future legislation, not implemented by ordinances with specific standards and specifications and designating land to which it applied (App. C, A-378-419). In effect the appellant argued that by Thurston County having done so they were making laws on an ad hoc, piecemeal basis, without due process of law and in violation of appellant's rights under the Fourteenth Amendment that resulted in private property being taken without just compensation for public use of an eagle preserve.

The appellant likewise argued that actions of Thurston County were without due process of law, but an arbitrary and capricious exercise of quasi-judicial authority unfairly used by the methods

they employed to make their second decision. It is sufficient to say that the motion and the additional authorities set forth substantial constitutional issues that not only the Commissioners exceeded their constitutional authority but also the Supreme Court of Washington without precedent of their previous decisions.

Before the Supreme Court had denied the motion for reconsideration fo the appellant, Thurston County commenced proceedings to change the environmental zoning of the property from "Rural" to "Conservancy". The appellant made a motion and application for a writ of prohibition against such action (App. A, A-232). It was denied by Supreme Court order on December 13, 1979 (App. A, A-243). Mandate of the Supreme Court terminated Supreme Court review on February 20, 1980 (App. A, A-246).

On March 19, 1980, the trial court indicated by letter that in view of the Supreme Court's decision there seemed to be no question that judgment should be entered in favor of Thurston

County (App. A, A-248). On April 2, 1980, judgment was entered in favor of Thurston County; the finesse had been completed (App. A, A-249).

Notice of Appeal was filed and served on May 13, 1980 (App. A, A-251). On May 16, 1980, Mr. Justice William H. Rehnquist granted the application of the appellant for time to docket the appeal to and including May 28, 1980 (App. C, A-425).

QUESTIONS ARE SUBSTANTIAL AND OF WIDESPREAD IMPACT[15]

Introduction

The questions presented for review are substantial and of widespread, constitutional importance to the individual rights of liberty of a person to choose, own, use, enjoy and dispose of its private property; subject to environmental limitations imposed on its use by the state for protection of the natural environment on its

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15 Agins v. City of Tiburon, United States Supreme Court No. 79-602, October Term, 1979.

property, and how those rights are to be determined by a court as to issues of fact or law, arising on separate causes of actions against the appellee under the Fourteenth Amendment of the United States Constitution and Article I Section 16 and the Fifth Amendment of the State of Washington and United States Constitution.

There is the question of the constitutionality of the state's actions as to the means employed by Thurston County and its Commissioners, as being or not being with procedural and substantive due process of law, when denying the appellant by ad hoc, environmental, administrative processes and quasi-judicial, piecemeal, discretionary decisions of the Commissioners when considering the "public interest" in the environmental value of the appellant's property, to repeatedly deny to the appellant liberty of its rights to choose, own, use, enjoy and dispose of substantially all of its private property, including riparian rights to the lake waters on which it is located, as was being

made by other property owners in the area where it was located, giving rise to a separate cause of action for violations of the appellant's constitutional rights guaranteed by the Fourteenth Amendment entitling the appellant to mandamus relief and damages on its separate cause of action for having been exercised either in excess of authority delegated to the appellees by legislation, or such authority was unconstitutional in violation of the Fourteenth Amendment.

There is the question that if such repeated separate actions of the county and the Commissioners have resulted in a substantial loss of the liberty of rights of the appellant to choose, own, use, enjoy and dispose of its property as otherwise permitted to others in the area where its property was located by such use being appropriated by indirect means for a public use of eagles without payment of any compensation to the appellant, then are not such end results a separate violation per se of the Fourteenth Amendment entitling the

appellant as a separate cause of action to mandamus relief, damages or compensation against the appellee without judicial consideration if whether such actions, as distinguished from the end results, of the appellee caused such consequences as being or not being without due processes of law, since the end results are prohibited by Article I Section 16 of the State Constitution and the Fifth Amendment of the United States Constitution?

There is also the question that effects the judicial means to be employed to prove in court issues of fact and law to obtain a judicial remedy of mandamus relief, damages or compensation upon those separate causes of actions, inter alia, that the appellant alleged and proved against the appellee, when the Supreme Court of Washington determined issues of fact and law as to the liability of the appellees prior to the completion of trial on those issues of fact and law by accepting appellate jurisdiction and reversing the partial mandamus relief afforded to the appellant by the

trial court on those causes of action prior to the appellant having been afforded an opportunity in court to offer proof as to the liability for damages and compensation that may have been awarded to it for relief of those alleged causes of actions against the appellees. The end result of the Supreme Court's decision as to make the Shorelines Management Act of 1971 and the decision of the Shorelines Hearings Board meaningless in preference to ad hoc environmental considerations to be exercised independently by "decision makers" exercising judicial functions of what is or is not in the environmental "public interest" to prohibit as they decide the exercise of individual liberty of a person to choose, own, and use its private property resulting in usurption of the quasi-judicial powers legislatively vested in the Shorelines Board and the jurisdiction of the trial court to determine issues of fact and law on the liability on those separate causes of action of the appellants to obtain judicial relief for constitutional violation of its rights by the appellee.

The questions are of special significance to this court since the actions of the appellee that serve as a basis for those separate causes of actions against them arise not from an exercise of a delegation of legislative regulatory authority to them by the state but of judicial authority delegated to them by the State Environmental Policy Act of 1971 to process by administrative adjudicatory means on an ad hoc, piecemeal basis to determine the environmental value of the property of the appellant to be preserved as natural environment and delegating state authority to the county Commissioners and other officials of local government carte blanche, discretionary, judicial authority as "decision-makers" to independently make quasi-judicial decisions binding in a court of law as to what areas of property the liberty of a person may not choose to own, use, enjoy and dispose of its private property without being required to determine if such prohibited use is being made by others in the area where the property

is located, and to prohibit such permitted private uses as they may retrospectively decide by check-mating prior legislative decisions already made under the Shorelines Management Act of 1971 on the same subject matter area-wide that permitted the use for which the appellant choose to use its private property.

It is claimed that the doctrine of the separation of powers, devised by the framers of the United States and State of Washington Constitutions to protect individual liberty from the exercise of governmental police powers by dividing those powers and granting each branch of government separate limited powers of government to check the powers of each by separating their functions, that otherwise would not be protected if all three powers were exercised by one, has been subverted and corrupt by the environmental legislation of SEPA delegating legislative authority as a judicial function to local governmental "decision makers" to determine "independently" of one another by exercising

judicial authority when making quasi-judicial decisions on an ad hoc, discretionary basis as to what is or is not by the exercise of their uncontrolled will in the "public interest" to be environmentally protected, and by authorizing those "decision makers" to prohibit the individual of its exercise of liberty to choose, own, use, enjoy and dispose of its property as not being in the "public interest". The primary judicial function of local government processing use applications for the private use of property to determine the environmental value of that property, and predict the consequences upon its environment of the proposed use if it is permitted, is an adjudicatory, administrative function preparatory for a determination to be made by the "decision makers". The primary functions for the "decision makers" is a judicial function not to substantively determine what is or is not in the "public interest" or determine what are the other "alternatives" an applicant should be permitted to use its property by discovery of

facts on their own account, a function of legislation, but to protect the constitutional rights of freedom of individuals to use their property by following judicial, constitutional, procedural safeguards when making that determination by not determining what is in the environmental "public interest" on their own account but only with reference to the prior determinations made by legislation or strictly in accordance with what has been made known in the environmental documentation authorized by legislation of SEPA to be set forth in EIS documentation, which in the process of its making may have afforded the private property owner an opportunity to be heard and in which to participate. Here the Supreme Court of Washington has authorized SEPA powers to be exercised by the appellee as they please without reference to such EIS documentation but to the Commissioner's own unbridled determination.

So to speak with clarity by the use of a metaphor, it is claimed the decision of the State

Supreme Court has allowed the hand of the legislature to feed its meat of deciding what private activity should be prohibited to protect the "public interest" in the natural environment to the judicial watch dog of the owner who is supposed to protect its master's liberty to use his private property free from unconstitutional intrusions of the legislature. As a result the watch dog is more interested in eating the meat than in protecting his master's rights. The owner is therefore left without any judicial protection of its rights for his watch dog has become an instrument of legislation so as not to protect its master's liberty from unconstitutional intrusions of the legislature but to serve the legislature by prohibiting his master from using his property while being concerned with eating the meat from the hand from which it is fed.

This case is specially noteworthy for the court to review as a companion when reviewing Agins v. City of Tiburon where a bold, direct, judicial attack was made unsuccessfully on the

constitutionality of the city's exercise of legislative powers of "open space" zoning without prior trial of the facts constituting if whether or not private property of the appellant had been "taken" for public use without just compensation because of such legislation. Compared with this case the appellant has pursued and exhausted every administrative and judicial remedy afforded by law but has been cutoff from being authorized to use its property and being afforded judicial relief on its causes of actions in court prior to trial of its causes of actions under the Fifth and Fourteenth Amendments of the United States Constitution by the decision of the Supreme Court of Washington, even though having pursued those remedies for its property having been "taken" for public use without just compensation that the Supreme Court of California justified as being the grounds for ruling in the favor of the City of Tiburon for not having been done.

Separate Causes of Actions Entitled to Judicial Relief

The active term of "taking" does not appear in the Fifth Amendment and Article I Section 16 of the United States and State of Washington Constitutions, but the term "taken" does appear as a prohibition against private property having been "taken" for public use without just compensation and without qualification by whom or what means of process the end is accomplished. Logic, although perhaps not experience,[16] would lead one to

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16 Kaiser Aetna v. United States, 100 S. Ct. 383 (1979) at 391:

> There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even in a situation as different from the riparian condemnation cases as this one. But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.

believe that since the end is prohibited by the Constitution and the Constitution is the supreme law of the land, then no matter what means were employed by any persons acting without or within the scope of delegated authority of state law to any of the three branches of government, including adjudication, that such action per se is without due process of law,[17] if the end prohibited has been accomplished.

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17 United States v. Lee, 106 U.S. (Otto) 196 (1892) at 218:

> If this constitutional provision (habeas corpus) is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation.
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> Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such

Nor does the constitution of the United States fuse[18] the Fifth and Fourteenth Amendment by saying "private property shall not be taken for public use without payment of just compensation and without due process of law". One also would be led to believe that the determination if whether

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[17] Continued

> cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name.

[18] Moore v. East Cleveland, 431 U.S. 494 (1976), Mr. Justice Stevens:

> The holding in Euclid v. Ambler Realty Co., 272 U.S. 365, that a city could use its police power, not just to abate a speciaif use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits.
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> In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property- . . .

such ends have been achieved, being a question of fact and not of law, should entitle one to a trial in court on those facts without judicial consideration of what means or for what other purpose of government were employed to achieve the result,[19] especially when the authority is delegated to limit the extent of use of private property by public officials making discretionary, adjudicate decisions as to what is the public interest in its environment. Further, experience should tell us, as a criteria, that if the value of the private estate must be judicially measured and balanced in the heads of the judiciary against the value of the public estate in regulating the use of property before the prohibition can be found to have occurred, then by considering the public estate as to

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19 Portsmouth Co. v. United States, 260 U.S. 327 (1922); United States v. Lee, 106 U.S. (Otto) 196 (1892); United States v. Reynolds, 397 U.S. 14 (1969); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

the means employed most likely will justify the end; and that is what has been done in this case. The appellant has been quasi-judicially and judicially "balanced" out[20] without equitable

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[20] El Paso v. Simmons, 379 U.S. 497, 432 (1964), Mr. Justice Black:

> All this for me is just another example of the delusiveness of calling 'balancing a 'test'. With its deprecatory view of equities . . . the Court through its balancing process states the case in a way inevitably destined to bypass the Contract Clause and let Texas break its solemn obligation. United States Trust Company of New York, Trustee v. New Jersey, 431 U.S. 1 (1976), protected private property rights through the Contract Clause. The court has found an "implied contract" arises for payment of compensation for property "taken" for public use: United States vs. Great Falls Mfg. Co., 112 U.S. 645 (1884); Mugler v. Kansas, 123 U.S. 623 (1887) states the converse at page 663: ". . . that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

consideration[21] of its private rights of liberty[22] to use, own and enjoy its property of unknown amount free from the uncontrolled judicial authority of the exercise of quasi-judicial will of the Commissioners leaving a remaining use that has also been damaged for public use without payment of any compensation.[23] Justice Holmes' "balancing", made in an age of free enterprise and expansion when the protection of private property against being "taken" by regulation and the need for adjustments by regulations of use of private property was less than now, has now gone "too

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21 Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

22 Lynch v. Household Finance Corp., 405 U.S. 538 (1972), at 552, Mr. Justice Stewart:

> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation.

23 United States v. General Motors, Inc., 323 U.S. 373 (1945).

far" to justify the means rather than prohibit the ends.[24] It is now being used to justify regulation in an age of conservation of natural resources; when although the need for adjustments by regulation may be greater, there is then more reason the prohibition should be safeguarded by this Court, if persons in these United States are going to have any liberty to own, use, enjoy and dispose of their private property without direct and indirect appropriation of it for public use by the state through local officials, exercising quasi-judicial discretionary ad hoc environmental authority, with or without due process of

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24 Agins v. City of Tiburon, Jurisdictional Statement, pages 19-22.

laws, and be justified in court for having done so and authorized at will to do so.[25]

The problem is not a stranger; various court concepts have been used: torts, implied contracts, property law, to strike down the justification of the actions for public purposes when looking at the end results. Perhaps, nothing more can be said than the equitable principle that the end result of regulation must be "just and fair" and not unequal[26] and if not, injunctive relief and damages or compensation should be awarded. This case affords the court that opportunity.

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25 The basic assumption made by the state for the regulation of the "environment" is that the natural environment is owned by the state apart from the rights of liberty of individuals to own, use, enjoy and dispose of private property including its environmental ammenities (App. B, A-280; App. C, A-355, 392). United States v. Lynah, 188 U.S. 445 (1903); Andrus v. Allard, 100 S. Ct. 318, 327 (1979).

26 Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Kaiser Aetna v. United States, __ U.S. __, 100 S. Ct. 393 (1979); Mongahela Navigation Company v. United States, 148 U.S. 312 (1803); Gordon v City of Waren, 379 F.2d 386 (6th Cir. 1978).

The advocate for "balancing" in this case may find it difficult to resolve how public interest in the environment of wildlife can be determined on an ad hoc, piecemeal adjudicatory basis by quasi-judicial decisions of the Commissioners of Thurston County and by judicial means of the state Supreme Court to justify for consideration of the environment by those "decision makers" exercising SEPA police powers, the preemption of legislative laws and regulations, that had already area-wide protected that public interest where the eagles sly.[27] The criteria of "balancing", for employing judicial restraint as to the wisdom of state legislative regulative action to the point it is decided by judges that it has gone "too far" by

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27 Mugler v. Kansas, 123 U.S. 623, 662 (1887):

> Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department.

exclusively employing the "too far" test, has come full circle in this case when such quasi-judicial and judicial restraint was not exercised as to SMA and its local area-wide regulations authorizing quasi-judicial SEPA decisions to preempt SMA legislation and regulations on the same subject matter.

A key to this case is the opinion of Justice Holmes in the Portsmouth case where the decision of the issue of property being taken was not restrained by "balancing" as to actions of the federal government for a direct violation of the Fifth Amendment and not via the Fourteenth Amendment as a state violation when the criteria if whether private property was taken could be determined as a matter of fact, not law, by the progressive and accumulative acts of firing artillery shells over private land to indicate an intention

that the practice shall continue.[28] Factually, that in practice is what has indirectly taken place in this case, for there is every reason to conclude from the actions of Thurston County and its Commissioners -although not artillery shells, that Thurston County does not intend to allow a large part of the area of Wood Point to be privately owned, used and enjoyed by anyone.

Independent of the Fifth Amendment and Article I Section 16 of the United States Constitution there are ample facts that there has been a procedural and substantive violation of SEPA that the

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28 Portsmouth Harbor L. & H. Co. v. United States, 260 U.S. 327 (1922). Also using the same approach are: Mosher v. Phoenix, 287 U.S. 29 (1932); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), at 184; United States v. Great Falls Mfg. Company, 112 U.S. 645 (1884).

Supreme Court of Washington has authorized as being unconsitutional that are in direct conflict with this Court's decision.[29]

CONCLUSION

It is suggested that the dilemma pointed out by the appellants in the Agins v. Tiburon case where the private owner can more easily find a remedy in federal court than in state court for a violation of the property having been "taken", need not be so if this Court were to hold on the factual pattern of this case that a state's violation of constitutional prohibitions against inverse condemnation is automatically a violation of the Fourteenth Amendment of the fundamental and traditional

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29 Truax v. Corrigan, 257 U.S. 312 (1921); Eastlake v. Forest City Enterprises, Inc., 426 U.S. 608 (1976); Ettor v. Tacoma, 228 U.S. 148 (1913); Moore v. East Cleveland, 431 U.S. 494 (1976).

rights of liberty[30] of a person to own, use, enjoy and dispose of property free from unfair, unjust and unequal restrictions placed upon it by any form of governmental action without payment of compensation, and when not similarly placed upon the use of other property, entitling the owner to not only injunctive relief but relief of damages or compensation and attorney's fees upon trial of the issues of fact in court.[31] Otherwise, others may be "due processed", "balanced out", "planned-out", "finessed" of their liberty to own, use, enjoy and dispose of property by a multitude of "decision-makers" enforcing piecemeal in every nook and

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30 Lynch v. Household Finance Corp., 405 U.S. 1971.

31 Bivens v. Six Unknown Fed. Narcotics Agents, 405 U.S. 388; Davis v. Passman, __ U.S. __, 60 L. Ed. 2d 846, 99 S. Ct. ___.

cranny of every state and local government office building, laws and protective regulations purportedly protecting the present and future of a free society from harm, from individual choice and initiative in the use of private property without consideration if such decisions are unfair, unjust and unequal.

Counsel prays that probable juridiction be noted.

Respectfully submitted,

Philip P. Malone
Attorney for Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

CERTIFICATE OF SERVICE

Philip P. Malone, duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States hereby certifies in compliance with Rule 33(b) he has caused to be served on all parties required to be served herein on May 28, 1980, three sets of the Jurisdictional Statement and Appendix to Jurisdictional Statement of Appellant by personal service to the parties' attorneys or their clerks at their offices, those attorneys being:

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